COMMENTS ON DRAFT STAFF ANALYSIS

Peace Officer Procedural Bill of Rights
05-RL-4499-01 (CSM 4499)

BY THE CITY OF SACRAMENTO

I, Dee Contreras, state:

That, I am the Director of Labor Relations for the City of Sacramento, which position I have held since November 1995. From 1990 until November 1995, I was the senior labor relations representative for the City of Sacramento. In these positions, my duties include negotiations with unions pursuant to the Meyers-Milias-Brown Act, contract administration, processing grievances, discipline review for police and fire, as well as miscellaneous employees[1]. Thus, I have been personally responsible for review of police discipline matters. In these positions, I have been involved in all areas of labor relations.

I have been involved in the labor relations area since 1980. I was a labor union representative from August of 1980 until June of 1990. I represented employees in disciplinary actions and hearings. I represented and defended the employees and unions in grievances. I negotiated and reviewed civil service rules and their application. I was thus involved in all aspects of labor relations from the union side for this period of time.

I am also an attorney, who has been licensed to practice in the State of California from November, 1979.

From my substantial experience in representing both labor and management, I am extremely familiar with both the *Skelly* process and the Peace Officers Procedural Bill of Rights (POBOR), and the differences between the two. I also was the primary individual for presenting and testifying on the within test claim when same was originally heard by the Commission on State Mandates. As a result, I have personal knowledge of the facts stated herein and if called upon to testify, I could do so competently.

The Commission on State Mandates, although it has done an admirable job, does not have a sound understanding of the differences between *Skelly* and POBOR, and as a result, has made some substantial errors in the Draft Staff Analysis upon reconsideration.

[1] Miscellaneous employees are those that are not safety employees, i.e. those that are not sworn police and fire.

1. Five Day Suspensions, Written Reprimands and Lesser Forms of Punishment Are Covered By POBOR But Not *Skelly* and Thus The Administrative Hearings Required Are Reimbursable Activities

As stated in my original comments to the Draft Staff Analysis on the original test claim[2], *Skelly* protections are to be given to permanent civil service employees subject to dismissal, demotion, short term suspension and reduction in salary. These protections are **not** afforded to short term suspensions, reclassifications or reprimands. *See Civil Service Assn.* v. *City and County of San Francisco* (1978) 22 Cal.3d 552, 558-564; *Schultz* v. *Regents of University of California* (1984) 160 Cal.App.3d 768, 775-787; *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1441-1442.

For example, in *Patton* v. *Board of Harbor Commissioners* (1970) 13 Cal.App.3d 536, the plaintiff sued challenging the City's charter, which allowed for a five day suspension within any 12 month period without the protection of a hearing before the civil service board, after he had been charged with insubordination and given a five day suspension without pay. After a long discussion as to the applicable standard, the court said:

> " . . . [T]he proper deportment of the Department's employees is furthered by the power of the General Manager to summarily apply temporary and minor disciplinary measures without a full blown investigation. The detriment to the employee, while not negligible, is, in our view, not sufficient to justify a holding that a hearing is the employee's constitutional right whenever his superior feels it necessary to discipline him in this way. The employee is not deprived of salary already earned, but merely of the opportunity to earn for several days." *Supra* at 541.

It is for this reason, and under this line of reasoning, that non-sworn personnel are not given the due process rights of a hearing under *Skelly* should the discipline imposed consist of a suspension for five days or less, or a written or verbal reprimand.

Again, the Commission states that written reprimands are subject to *Skelly*, which is not the state of the law. Contrary to the analysis of the Commission's staff, written reprimands are not governed by *Skelly*; rather they are governed by POBOR.

In *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, a permanent peace officer employed by the City of West Sacramento, received a written reprimand. The Memorandum of Understanding negotiated between the West Sacramento Police Officers

[2] See Comments to Draft Staff Analysis, received August 6, 1999, Administrative Record (hereinafter "A.R."), starting at p. 463.

Association and the City of West Sacramento[3], provided that written reprimands issued by a supervisor were appealable to the Chief of Police; and further that those written reprimands issued by the Chief of Police were appealable only to the Appointing Authority or his or her designee. As Stanton's written reprimand was issued by his supervisor, he appealed to the Police Chief, who held a hearing at which Mr. Stanton was represented by counsel, and presented evidence on his behalf. The Chief upheld the written reprimand and denied the appeal.

Not satisfied with the results of the appeal, Mr. Stanton filed a writ of mandate in superior court arguing that he was entitled to an administrative appeal pursuant to the City's personnel rules and MOU. Mr. Stanton argued that the appeal rights afforded him under the MOU conflicted with the due process rights guaranteed by *Skelly*.

Accordingly, when the matter was reviewed by the Appellate Court, the first issue undertaken was whether the MOU conflicted with the due process rights enunciated in *Skelly*. The court specifically held that the guarantees of *Skelly* **do not** apply to a written reprimand offered a permanent employee:

> " . . . As the City notes, no authority supports plaintiff's underlying assertion that issuance of a written reprimand triggers the due process safeguards outlined in Skelly. Courts have required adherence to Skelly in cases in which an employee is demoted (Ng. v. State Personnel Board (1977) 68 Cal.App.3d 600, 606 [137 Cal.Rptr. 387]); suspended without pay (Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal.3d 552, 558-560 [150 Cal.Rptr. 129, 586 P.3d 162]); or dismissed (Chang v. City of Palos Verdes Estates (1979) 98 Cal.App.3d 557, 563 [159 Cal.Rptr. 630]). **We find no authority mandating adherence to Skelly when a written reprimand is issued.**
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> **"We see no justification for extending Skelly to situations involving written reprimands.** Demotion, suspension and dismissal all involve depriving the public employee of pay or benefits; a written reprimand results in no such loss to the employee." *Stanton, supra* at 1442. [Emphasis added.]

Thus, contrary to the law of the State of California, suspensions of five days or less or written reprimands are not subject to Skelly. The fact that they are, in fact, subject to POBOR which requires an administrative appeal, means that written reprimands and suspensions of five days or less are activities subject to reimbursement.

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[3] These Memoranda of Understanding are commonly referred to as "MOUs, and are authorized pursuant to the Meyers-Milias-Brown Act, Government Code, Sections 3500 *et seq. See, Santa Clara County District Attorney Investigators Association* v. *County of Santa Clara* (1975) 51 Cal.App.3d 255.

2. Not Every Termination of a Police Chief Warrants a Liberty Interest Hearing

On page 27 of the Draft Staff Analysis, the Commission Staff comes close to the conclusion that there is no reimbursable activity for the administrative appeal of the termination of a police chief, as it involves a "liberty interest". Although liberty interests are entitled to a due process hearing, that is not what is called for under POBOR. Under POBOR, **all** chiefs of police are entitled to a written notice, the reason for removal, and the opportunity for an administrative appeal.

Absent a written employment contract to the contrary, Chiefs of Police hold their position at the will of the appointing authority. At will employees can be terminated for any reason, or no reason at all. As I stated in my testimony before the Commission[4], when someone is terminated during probation, before they become a permanent employee entitled to civil service protections, they are just notified that they are terminated, without a reason. Same would be true for a police chief, but for the protections of POBOR. Now every police chief who is removed from his position is required to be given a written notice, the reason for removal, and the opportunity for an administrative appeal

The Commission Staff's Draft Staff Analysis does not provide for any reimbursement for an administrative appeal of the removal of a police chief, implying that any such removal would automatically be entitled to an administrative hearing under due process as a "liberty interest" hearing. This is not accurate.

For example, in *Williams* v. *Department of Water and Power* (1982) 130 Cal.App.3d 677, Ms. Williams was an intermittent, non-civil service employee who had worked in her position for 13 years. She was terminated due to excessive absenteeism. She sought reinstatement and, amongst other things, a "liberty interest" hearing. The court held that not only was she not entitled to reinstatement, the basis for her termination did not give her the right to a liberty interest hearing. The court found, essentially, that unless the basis involved moral turpitude, there is no right to a liberty interest hearing:

> "The mere fact of discharge from public employment does not deprive one of a liberty interest. (*Beller* v. *Middendorf* (9th Cir. 1980) 632 F2d 788, 806; *Gray* v. *Union County Intermediate Education District* (9th Cir. 1975) 520 F.2d 803, 806.) Appellant must show her dismissal was based on charges of misconduct which "stigmatize" her reputation or "seriously impair" her opportunity to earn a living. (See *Codd* v. *Velger*(1977) 429 U.S. 624, 628 [51 L.Ed.2d 92, 97, 97 S.Ct. 882].) Although *Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.ed 340 [159 Cal.Rptr. 440], articulates the exception to the rule on which appellant relies (p. 346), it is of no assistance to her. The misconduct in *Lubey* involved moral turpitude of

[4] See A.R., at pages 528-529.

police officers and further, the civil service commission advised they were entitled to no future city and county .employment (p. 344). Here the termination was for excessive absenteeism, not conduct involving moral turpitude, and the civil service commission advised appellant that she will not be disqualified automatically and can be considered for city employment. "Nearly any reason assigned for dismissal is likely to be to some extent a negative reflection on an individual's ability, temperament, or character. (*Jenkins* v. *U.S. Post Office,* 475 F.2d 1256, 1257 (9th Cir. 1973). But not every dismissal assumes a constitutional magnitude." (*Gray* v. *Union County Intermediate Education District* (9th Cir. 1975) 520 F.2d 803, 806.)

"The leading case of *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 574 [33 L.Ed.2d 548, 559, 92 S.Ct. 2701] distinguishes between a stigma of moral turpitude, which infringes the liberty interest, and other charges such as incompetence or inability to get along with coworkers which does not. The Supreme Court recognized that where "a person's good name, reputation, honor or integrity is at stake" his right to liberty under the Fourteenth Amendment is implicated and deserves constitutional protection. (408 U.S. at p. 574 [33 L.Ed.2d at p. 559].) "In the context of *Roth*-type cases, a charge which infringes one's liberty can be characterized as an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence is likely to have severe repercussions *outside* of professional life. Liberty is not infringed by a label of incompetence, the repercussions of which primarily affect professional life, and which may well force the individual down one or more notches in the professional hierarchy." (*Stretten* v. *Wadsworth Veterans Hospital* (9th Cir. 1976) 537 F.2d 361, 366; italics added; fn. Omitted.)" *Williams, supra* at 684-685.

The Commission's Draft Staff Analysis does not distinguish between those situations where there would be a right to a due process liberty interest hearing from all situations where a Police Chief is terminated. As seen above, only those situations involving allegations of moral turpitude rank a liberty interest hearing.

It is not uncommon for a change in the composition of a city council to result in a change in department heads and management. The removal of a police chief due to a majority's desire to have different management would not, absent POBOR, give rise to a liberty

interest hearing. However, under POBOR, the Chief of Police would be entitled to all the protections that POBOR affords, including an administrative hearing.

Although the removal of a Police Chief is not an every day occurrence, it would be a rare circumstance where the allegations would, absent POBOR, give rise to a liberty interest hearing. This factor has been totally overlooked by Commission Staff.

3. Interrogations

At the hearing on the test claim, substantial evidence was presented as to how a POBOR interrogation differs from that of a civil service employee who is not entitled to those protections[5].

First of all, when you are interrogating a civil service employee, you do not have to notify them in advance of the allegations of misconduct. You can merely ask them where they were at a given time on a given day. You don't have to inform the person that the allegation was that they were out of the jurisdiction at a liquor store at a particular time.

With POBOR, the officer receives notice of the allegations in advance. As the officer is entitled to representation, this means that the officer will have had time to prepare a response and reason for his or her conduct in advance. This makes interrogations, and the preparation for them, much more difficult. All possible theories and explanations must be investigated in advance, so that the officer will not be able to come up with an easy rationale for his conduct.

It is for that reason that the time spent preparing for the hearing, as well as providing the notice and name of the interrogating personnel in advance, was allowable as a reimbursable activity. Additionally, it was my understanding that not only straight time was to be allowed for the interrogation, but if overtime was necessitated, that would also be compensable as well.

In no other circumstance does due process require that the allegations of misconduct be presented to the employee in advance. This renders interrogations much more onerous than would be required absent POBOR. Commission Staff has not found any authority for the proposition that due process requires an employee to be provided with notice of the interrogation, as well as the identification of the interrogating personnel in advance. Also, the Commission Staff has totally disregarded the testimony in the record regarding the more onerous requirements imposed when interrogations are handled under POBOR.

Accordingly, it is respectfully requested that the following activities be found reimbursable:

- Compensating the peace officers for interrogations, including off-duty time in accordance with regular department procedures. (Gov. Code, §3303(a).)

[5] See, for example, A.R. 525 *ff.*, 550 *ff.*

- Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code § 3303(b) and (c).

4. Adverse Comments

The Commission Staff has recommended denying all activities concerning an adverse comment on the basis that those activities can be deemed to be part and parcel of federal due process, as they can result in a punitive action.

One of the biggest issues is that an adverse comment, which would not constitute discipline under civil service rules, is deemed punitive for the purpose of POBOR, which would not exist absent the state legislation. See, for example, *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347.

Furthermore, the claim by Commission Staff that the activities previously found reimbursable are merely *de minimis* flies in the face of my prior testimony[6]. It is not a *de minimis* activity when it comes to handling adverse comments. As I testified earlier, POBOR creates a right of the employee to respond to adverse comments. No where else is a civil service employee given that right. Obviously, an employee is not going to respond to an adverse comment on his own time, but will use the time he should be devoting to his official duties to respond to the adverse comment. Often times, the adverse comment response will be pages and pages of information and questions, which requires a substantial amount of administrative time to respond. Additionally, there is the added obligation to process, file and maintain those responses and attach them to the correct document, and make sure they are filed properly.

This activity is far from *de minimis*, and exists no where other than in POBOR. No civil service employee who is not covered by POBOR has this right.

Conclusion

Although Commission Staff has done an admirable job of analysis when it comes to the fact that POBOR does, in fact, constitute a reimbursable mandate, the lack of operational knowledge concerning labor relations is apparent.

Not every personnel issue creates a liberty interest entitling a person to a due process hearing. If that were the case, even at will employees would have a right to a hearing when they were terminated, for which no reason is required. Federal and state law do not give civil service employees an entitlement to a hearing for a liberty interest, unless moral turpitude or some other grievous wrong is alleged. Mere incompetence and termination does not give rise to such a hearing.

Accordingly, I respectfully request that the original statement of decision be reinstated, with the following provisos:

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[6] A.R. 531, *ff.*

- That it be acknowledged that discipline of suspension of five days or less and written reprimands giving rise to administrative hearings be deemed reimbursable activities.
- That not only overtime but straight time for interrogations, as well as the time for their preparation, be found reimbursable.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief, and as to those matters stated upon information and belief, I believe them to be true. Executed this 17th day of March, 2006 at Sacramento, California.

Dee Contreras

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